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JOURNAL of LAW REFORM ONLINE

COMMENT

FILL THE BENCH AND EMPTY THE DOCKET: FILIBUSTER REFORM FOR DISTRICT COURT NOMINATIONS

Jeremy Garson*

Judges are, without question, vital to our justice system. They interpret, adapt, and apply the law. They resolve disputes for the parties to the case at issue and provide guidance to others in analogous situations. They are the gears that keep the wheels of justice moving. Unfortunately, in the case of our federal courts, many of these gears are missing. Eighty-three of our 874 federal judgeships are vacant,¹ including thirty-four that have been declared “judicial emergencies.”²

Our Constitution vests the President with the power to nominate federal judges and the Senate with the power to confirm or reject them,³ and Senate rules give the Judiciary Committee the power to hold hearings on each judicial nominee.⁴ Additionally, every individual senator has the ability to extend debate indefinitely (also known as the filibuster).⁵ As anybody who follows politics knows, this can lead to contentious debates and lengthy confirmation processes that keep getting lengthier.⁶

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1. *Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Sept. 5, 2012); *Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited Nov. 27, 2012).

2. *Judicial Emergencies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited Nov. 27, 2012).

3. U.S. CONST. art. II, § 2, cl. 2.

4. 157 CONG. REC. S837 (daily ed. Feb. 17, 2011) (“Meetings of the Committee may be called by the Chairman as he may deem necessary...”), *available at* <http://www.judiciary.senate.gov/about/committee-rules.cfm>.

5. *Filibuster and Cloture*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited Sept. 5, 2012).

6. As of the beginning of September, the average wait time until confirmation for district court nominees during the Obama administration is ninety days, up from twenty-one days during the Bush administration, and eight days by the end of the Clinton

Using the filibuster on judicial nominees, however, is only a recent development. In fact, it was not until 1968 that either party used the filibuster to block a judicial nominee (the victim was Abraham Fortas), and it was not used to block lower court nominees until Reagan's presidency. Just because the trend is recent, though, does not make it arbitrary. With regard to the Supreme Court, there are only nine Justices, and they have the final word on what the Constitution means. Therefore, the credentials of each candidate *should* be reviewed carefully and if there is reason to believe that they may not be qualified, there should be mechanisms in place to prevent a swift confirmation. It also makes sense with circuit court judges since their word is final unless the Supreme Court agrees to hear the case—an extremely rare occurrence.⁷ With district court judges, however, there should be less of a reluctance to confirm.

Federal district courts are (almost) always the first place federal litigants go when seeking justice. As a result, they play a vital role in the development of the common law and jurisprudence nationwide. At the same time, however, federal litigants have the right to appeal district court judgments to the appropriate circuit court unless they have expressly waived that right.⁸ In other words, while providing a great service to those seeking justice, district court judges rarely, if ever, have the last word in high-stakes, controversial constitutional matters. Therefore, judicial vacancies at the district court level should be a rare occurrence. Unfortunately, this is not the case. Instead, nearly one in every ten district court judgeships is vacant.⁹ Indeed, of the thirty-four current “judicial emergencies,” twenty-eight of them are at the district court level.¹⁰

To alleviate this problem, help reduce the backlog that currently plagues our judicial dockets, and provide improved

administration. Steven M. Klepper, *Confirming Consensus Nominees Quickly*, THE FED. LAWYER 44 (Sept. 2012).

7. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 250 (2009) (noting that less than 1 percent of cases appealed to the Supreme Court are granted certiorari).

8. See 9B FED. PROC., L. ED. § 22:2083 (setting forth the rules regarding a waiver of the right to appeal).

9. See *Federal Judgeships*, *supra* note 1; *Judicial Vacancies*, *supra* note 1.

10. *Judicial Emergencies*, *supra* note 2.

justice for those who seek it, I propose to eliminate the ability to filibuster district court nominees. The argument against filibuster reform has always been the same: it protects the minority from the tyranny of the majority. While the Constitution makes no mention of the filibuster, it is the law of the Senate under Senate Rule 22,¹¹ and has become an accepted tool for the minority to stop the majority from unilaterally pushing through legislation, Executive Branch appointments, and judicial nominations.

This makes sense for legislation and Executive Branch nominees (enacted legislation is rarely repealed and it is difficult to overturn decisions made by executive officials).¹² It also makes sense for some judicial nominations (circuit court and Supreme Court justices). As mentioned above, however, federal litigants have the right to appeal from district court rulings, and while the district court's ruling carries weight on appeal, circuit court judges are certainly not obligated to defer to the district judge's conclusions of law. Therefore, the advantages that filibuster protection offers to the minority, at least in the case of district judges, are outweighed by the advantages that would come with its elimination. The stakes are relatively low, and a filibuster-free process would still require the approval of a majority of senators.

Logistically speaking, this proposal would be easy to adopt. The Senate is vested with the unilateral power to "determine the Rules of its Proceedings" under Article I, Section 5 of the Constitution.¹³ Neither the President nor the House of Representatives has a say in the matter, and the Supreme Court has affirmed this power.¹⁴ Therefore, if a sufficient number of senators were on board, a rule could be passed to make this the "law" of the Senate.¹⁵

11. *Cloture*, U.S. SENATE, http://www.senate.gov/reference/reference_index_subjects/Cloture_vrd.htm (last visited Sept. 5, 2012); *Filibuster and Cloture*, *supra* note 5.

12. *See, e.g.*, *Wash. State Nurses Ass'n v. N.L.R.B.*, 526 F.3d 577, 579 (9th Cir. 2008) (overturning a ban on wearing union buttons four years after the ban was put into place); *cf.* John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 337 (2010) ("[T]he courts have overturned only two executive orders since 1789.").

13. U.S. CONST. art. I, § 5.

14. *See* *United States v. Ballin*, 144 U.S. 1, 4 (1892) (affirming that Congress may determine its own rules).

15. *See generally* *Cogswell v. United States*, 353 Fed.App'x. 175 (10th Cir. 2009) (rejecting the argument that the failing to quickly confirm judicial nominees is a denial of

Of course, filibuster reform is much more difficult in the world of practical politics. As Chief Justice John Roberts previously stated, “[e]ach political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes.”¹⁶ Chief Justice Roberts is correct in that the senators whose party does not control the White House do not want to give more power to the President. On the other hand, there is precedent for the majority party pushing through a change to Senate Rule 22 in order to facilitate action.¹⁷

My proposal, of course, is a much more narrow change to the rule. Regardless of the wisdom of requiring sixty senators to end a filibuster, there simply is not sufficient political momentum for such a significant reform.¹⁸ Instead, my proposal seeks only to promote judicial efficiency in an area where the possible negative consequences of such efficiency, as illustrated above, are simply not that great. Therefore, I believe a bipartisan approach would not only be ideal, but also would be very possible—even in our government as it exists today. Naysayers may say that this is wishful thinking in today’s highly charged political atmosphere, but this may not be true. After all, as recently as 2011, Democrats and Republicans had an agreement in place, “[to] only block judicial nominees in extraordinary circumstances”¹⁹ and that this agreement included both district and circuit court nominees. So the political will needed to pass this narrow, common sense reform may not be as great as it might seem on first blush.

access to the courts); *but cf.* Karl A. Schweitzer, Comment, *Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process*, 12 U. PA. J. CONST. L. 909 (2010) (arguing that litigation is the most effective means of eliminating the judicial filibuster); *Judicial Watch, Inc., v. United States Senate*, 432 F.3d 359 (D.C. Cir. 2005) (hearing arguments that the filibuster is unconstitutional as applied to judicial nominees).

16. Robert Barnes, *Justice Roberts Urges End to Partisan Fights Blocking Action on Federal Judges*, WASH. POST (Dec. 31, 2010, 6:01 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/31/AR2010123103188.html>.

17. See Walter F. Mondale, *Resolved: Fix the Filibuster*, N.Y. TIMES (Jan. 1, 2011), <http://www.nytimes.com/2011/01/02/opinion/02mondale.html>.

18. *Cf. Putting Their Knives Away: The Senate Shies Away from Big Reform*, THE ECONOMIST (Feb. 3, 2001), available at <http://www.economist.com/node/18070585> (discussing the failed movement toward filibuster reform).

19. See Humberto Sanchez, *Filibuster Tests Senate Agreement on Judicial Nominees*, ROLL CALL (Dec. 7, 2011, 12:00 AM), http://www.rollcall.com/issues/57_70/filibuster_tests_senate_agreement-210833-1.html.

Of course, the public would need to be educated about the merits of the proposal before the Senate attempted to pass this rule change. Otherwise, there is a very good chance that the debate would be overwhelmed by partisan politics. Still, if the parties agree that the process needs to be smoother, maybe they can also achieve the cooperation needed to avoid a rebellion within their own parties.